Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	

COMMENTS OF THE OHIO CONSUMERS' COUNSEL, THE MARYLAND OFFICE OF PEOPLE'S COUNSEL, THE MAINE PUBLIC ADVOCATE OFFICE, THE TEXAS OFFICE OF PUBLIC UTILITY COUNSEL AND THE PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE

The Federal Communications Commission ("Commission") has issued a *Notice of Proposed Rule Making and Order* in the above-captioned proceeding[1] seeking comment on several issues surrounding the definitions of the terms "reasonably comparable" and "sufficient" found in 47 U.S.C. § 254(b)(3) and (5), on remand from the Tenth Circuit Court of Appeals.[2] Robert S. Tongren, in his capacity as the Ohio Consumers' Counsel ("OCC"), the Maryland Office of People's Counsel ("MD OPC"), the Maine Public Advocate Office ("MPAO"), the Texas Office of Public Utility Counsel ("TX OPUC") and the Pennsylvania Office of Consumer Advocate ("PA OCA") (collectively referred to as "Consumer Advocates") are each individually authorized by their respective state statutes to represent the interests of utility consumers in their states before state and

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[1] FCC 02-41, adopted February 13, 2002 ("*Notice*").

[2] *Qwest Corporation v. Federal Communications Commission*, 258 F.3d 1191 (10th Cir. 2001) ("*Qwest*").

federal courts and agencies.[3] The Consumer Advocates submit that, in the context of rates, "reasonably comparable" should be defined as "no more than 135% of"; in the context of services, it should be defined as "not differing in any significant degree." "Sufficient" should be such that, after the states have been encouraged to establish their own universal service support mechanisms, rates in each state's rural areas will be no more than "reasonably comparable" to rates in urban areas.[4]

I. REASONABLY COMPARABLE

In order to determine the reasonable comparability of rates, the Commission seeks comment on the factors that should be included for comparison.[5] Among the issues presented by the Commission are:

- Whether definitions of "urban" and "rural" are necessary for comparison purposes;
- If so, what the definitions should be;
- What range of rates would be fair in determining whether the rates are reasonably comparable; and
- Other factors that should be considered when determining the reasonable comparability of rates.[6]

Section 254(b)(3) of the Telecommunications Act directs the Commission to ensure that the telephone services and rates offered in rural areas are reasonably

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[3] See Ohio Rev. Code Chapter 4911 (OCC); Md. Code Ann., PUC § 2-201–2-205 (1999) (MD OPC); 35-A M.R.S.A. Section 1702 (MPAO); Tex. Util. Code §13.001 *et seq*. (Vernon Supp. 2002); 71 P.S. § 309-2 (PA OCA).

[4] The Commission also requested comments on "benchmark" issues. These are incorporated herein. The Commission also requested comments on inducements for states to have universal service programs. The Consumer Advocates reserve the right to comment on those issues in reply.

[5] *Notice*, ¶ 16.

[6] *Id.*

comparable to similar services and rates offered in urban areas. It is clear therefore that definitions of "rural" and "urban" are necessary to accomplish the directive set forth in the Act except where services and rates are identical throughout an entire state. Without such definitions neither the Commission nor anyone else would have any way of knowing whether rates in rural areas are reasonably comparable to rates in urban areas.

Although this part of the proceeding concerns only non-rural carriers,[7] in developing definitions for "rural" and "urban" the Commission can turn to a portion of the definition of "rural telephone company" found in § 3(a)(47)(A) of the Act.[8] Under the Act, a "rural telephone company" is any local exchange carrier to the extent that such carrier provides service to an area that includes neither an incorporated place of 10,000 population or more nor any territory included in the Census Bureau's definition of "urbanized area."[9] The Consumer Advocates suggest that the Commission follow this language in determining whether an exchange is "urban" or "rural."[10] Thus, a "rural" area would be any exchange that includes neither an incorporated place of 10,000 population nor any territory that is considered to be an "urbanized area" under the Census Bureau's definition. On the other hand, "urban" exchanges would be those where the majority of customers are in "urbanized areas." These definitions are not beyond dispute, but are reasonable and consistent with the Act. That is all the Tenth Circuit asked.[11]

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[7] See *Ninth Report and Order and Eighteenth Order on Reconsideration*, CC Docket No. 96-45, FCC 99-306, adopted October 21, 1999, ¶ 11.

[8] 47 U.S.C. § 153(37)(A).

[9] *Id.*

[10] The additional criteria for "rural telephone company" found in 47 U.S.C. § 153(37)(B)-(D) are company-wide measurements and would not easily be converted to an exchange-by-exchange measurement.

[11] See *Qwest*, 258 F.3d at 1201.

The same standard applies to the definitions of "reasonably comparable." In order to define "reasonably comparable" for rates, it is helpful to examine what it is not.[12] "Reasonably comparable" does not mean "equal"; that is the lower limit.

Establishing the upper limit is more of a problem. In the *Ninth Report and Order*, the Commission adopted the Joint Board's recommendation defining "reasonably comparable" as meaning a "fair range of urban/rural rates both within a state's borders, and among states nationwide."[13]

The court rejected this "definition." It also rejected the Commission's use of a national cost benchmark of 135%. The court found that the Commission did not analyze the issue; it simply chose a benchmark that was a "reasonable compromise of commenters' proposals."[14] The Tenth Circuit found the rationale to be inadequate.[15]

One solution is to recognize the conceptual link between reasonably comparable rates and the comparability of costs that produce those rates. The Commission's universal service support mechanisms will go to balance out those costs so that customers in high-cost exchanges will have no more than reasonably comparable rates.

Hence the issue comes back to defining the upper limit of reasonably comparable rates. It may be that there can be no scientific definition of the term.[16] One can begin the

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[12] The clear purpose of the § 254(b)(3) language is to ensure that support is sufficient that rural rates are **no more than** reasonably comparable to urban rates. Congress would not have intended for support to go to urban areas if the urban areas' rates were higher than those in rural areas.

[13] See *Notice*, ¶ 14.

[14] See *Ninth Report and Order*, ¶ 55.

[15] *Qwest*, 258 F.3d at 1201.

[16] Indeed, the infinite variations on what is "reasonable" have occupied courts and regulatory commissions for many years, and will for many years to come. One approach that Pennsylvania has taken is to cap basic local service rates at $16 for ILECs other than Verizon. See *Joint Petition of Nextlink, et al. and Joint Petition of Bell Atlantic, et al.,* Docket Nos. P-00991648 and P-00991649, Order (September 30, 1999).

test, however. It strains belief to say a rural rate that is "twice" (200% of) an urban rate is "reasonably comparable" to the urban rate. Further, "half again as much" (150% of) also does not fit with the notion of "reasonably comparable."[17]

Working from the other direction, it would strain credulity to assert that a rural rate that is 105% of an urban rate is **not** reasonably comparable. The same could be said for 110%. On the other hand, it is not obvious that rural rates that are 120% of urban rates are not reasonably comparable.

The Consumer Advocates submit that the Commission's prior 135% benchmark for costs – "no more than 135% of urban costs" – is also a reasonable point between 120% (a "lower limit" for "reasonably comparable") and 150% (an "upper limit") for rates. The Commission should adopt the 135% definition for reasonably comparable with this rationale, and then readopt the 135% benchmark.

Another factor that the Commission should consider in determining the reasonable comparability of rates is the exchange's local calling area. There can be a wide discrepancy in the local calling areas of exchanges served by the same company that might not be reflected in the rates the company charges. For example, in Ohio Sprint serves both Pataskala and Croton in western Licking County. Pataskala has a flat-rate local calling area with access to 958,528 lines, while Croton's flat-rate local calling area accesses 61,557 lines, 6.4% of the number of lines in Pataskala's local calling area. Pataskala residential customers pay $17.60 for flat-rate local calling, while Croton

[17] As the Commission notes, "[t]he court suggested that rates differing 70 to 80 percent would not be within a fair range of rates that could be considered reasonably comparable." *Notice*, ¶ 8.

residential customers pay $14.95 for flat-rate local calling, or 84.9% of Pataskala's flat rate.[18]

Wide discrepancies in local calling areas indicate that a rural exchange's rates and services are not reasonably comparable to those in urban areas. The Commission should make local calling areas a factor in determining reasonable comparability.[19]

The Commission should also examine the range of services and features that are available to customers in rural and urban areas. In Ohio, many rural telephone companies charge a monthly touchtone fee, which for some companies can be two dollars or more, although their larger counterparts have eliminated this charge. Thus, many rural customers must pay as much as $25 more per year in order to have the same ability as other companies' customers to use touchtone service. In addition, services – such as Caller ID, call waiting and call forwarding – that urban customers may access easily may be lacking in rural areas.

The Commission's determination regarding whether urban and rural rates are reasonably comparable goes beyond a price-cost analysis. The Commission should also compare what the customers in those areas get for their money and the services and features that are available to them. In the context of services, "reasonably comparable" should be defined as "not differing in any significant degree."

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[18] See Sprint/United Ohio Tariff, PUCO No. 6, at Sec. B, Sheet 2 (available at http://www.puc.state.oh.us/docket/tariffs/Tcom/sprint/Local/SecB.pdf).

[19] In the universal service *Report and Order*, the Commission discussed local calling areas in the context of both affordability and reasonable comparability. *In the Matter of the Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, FCC 97-157, adopted May 7, 1997 ("*Report and Order*"), ¶ 114.

II. SUFFICIENT

The Commission also seeks comment on various aspects of determining whether high-cost support in rural areas is sufficient under § 254 of the Act.[20] The Commission asks whether the examination of sufficiency should only include the reasonable comparability of the rates or should be broader.[21] The Commission also seeks comment on the weight that should be given to the various universal service principles listed in § 254(b) of the Act, and whether sufficiency should be determined by considering only federal support or federal and state support.[22]

Reasonable comparability of rates and services is just part of the universal service equation. Section 254(b) of the Act contains six other principles on which the Commission and the Joint Board also *must* base universal service policies:

- the availability of quality service at just, reasonable and affordable rates;
- access to advanced telecommunications and information services by all regions;
- equitable and nondiscriminatory universal service contributions by all telecommunications services providers;
- specific, predictable and sufficient federal and state support mechanisms;
- access to advanced telecommunications services for schools, healthcare providers and libraries; and
- any other principles that the Commission and the Joint Board determine to be necessary and appropriate to protect the public interest, convenience and necessity.

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[20] *Notice*, ¶ 17.

[21] *Id.*

[22] *Id.*

The Commission has adopted one additional principle: that universal service support mechanisms and rules should be competitively and technologically neutral.[23] The Commission's universal service policies should strike a fair and reasonable balance among all these principles.[24] Thus, the Commission's examination of whether universal service support is sufficient must go beyond a determination that rates in rural areas are reasonably comparable to urban areas' rates.[25]

The Consumer Advocates urge the Commission to give additional weight to service quality. Service quality and reasonably comparable rates go hand-in-hand for most consumers. Access to advanced services is secondary; access to advanced services means little to consumers if the quality of service provided renders these services practically unusable.

In its *Report and Order*, the Commission declined to adopt at that time federal service quality standards as a condition to receiving universal service support.[26] Instead, the Commission chose to rely on existing data – compiled from the Commission's Automated Reporting Management Information System ("ARMIS") – to monitor service quality.[27] Nevertheless, the Commission left the door open for future federal service quality standards: "[W]e may re-evaluate the need for additional service quality reporting requirements in the future."[28]

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[23] See *Report and Order*, ¶¶ 48-49.

[24] *Id.*, ¶ 52.

[25] A universal service fund that is no more than sufficient will prevent the "excessive subsidization of universal service by long distance" feared by the court. See *Notice*, ¶ 9.

[26] *Report and Order*, ¶ 99.

[27] *Id.*

[28] *Id.*

The time for such a reevaluation is at hand. The states in the SBC/Ameritech region know first-hand about the problems associated with inadequate service quality. Since the issuance of the *Report and Order*, Ameritech service region-wide deteriorated to a point that customers had no assurance that quality lines, or even dialtone, would be available when they tried to make a call. Ameritech's customers often had to wait weeks for repairs and frequently found that Ameritech's repair personnel failed to fix the problem the first time. Repeat trouble reports were common in all Ameritech states. It took an unprecedented meeting of the chairs of the state utility commissions in all five Ameritech states in August 2000 to begin the process of improving Ameritech service. Still, twenty-two months later, Ameritech's service remains inadequate in many areas.

Many other local exchange carriers are also experiencing declines in service quality, as shown in the Commission's ARMIS reports. For example, from 1997 to 2000, for Regional Bell Operating Companies ("RBOCs") overall, complaints per one million lines nearly tripled, local residential service repair intervals increased by approximately seven hours, residential repeat intervals increased by over eight hours and repeat residential trouble reports were up four percent.[29] It is no wonder that the percentage of dissatisfied RBOC residential customers rose from about 10.5% in 1997 to nearly 16.5% in 2000.[30]

The Commission should make it a priority to stem this tide. The availability of quality service at just, reasonable and affordable rates should be the primary factor in determining whether universal service support is sufficient. The Commission should

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[29] See charts found at http://www.fcc.gov/wcb/armis/sq (accessed April 4, 2002).

[30] *Id.*

begin addressing "broader, more wide-ranging service quality issues,"[31] and consider steps to improve service quality, including the withholding of federal universal service support to carriers whose service quality is found to be consistently lacking.

Although the Commission does not have service quality information from all local exchange carriers, the ARMIS reports provide service quality data for carriers that collectively serve 95 percent of access lines.[32] Thus, the Commission can monitor local exchange carriers that serve the vast majority of consumers, including all non-rural carriers – the subject of this part of the proceeding.

Although application of this principle may not be strictly competitively neutral, since it will only apply to incumbent carriers that are subject to price cap regulation,[33] the Commission should not be deterred from going forward with this reevaluation. As the Tenth Circuit noted, "[T]he FCC must base its policies on the principles, but any particular principle can be trumped in the appropriate case."[34] The sad fact is that, as we approach the fifth anniversary of the *Report and Order*, the vast majority of residential local telephone consumers still do not enjoy the benefits of real competition. Moreover, in those instances where competition involves resellers, the service quality of the incumbent adversely affects the competitor. In this instance, the competitive neutrality of the application of universal service principles should be trumped by the principle that *quality* service be available at just, reasonable and affordable rates.

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[31] *Report and Order*, ¶ 101.

[32] *Id.*, ¶ 99.

[33] *Id.*

[34] *Qwest*, 258 F.3d at 1200.

It is also clear that the existence and sufficiency of state universal service mechanisms is a component of whether the federal universal service scheme is sufficient. Section 254(b) of the Act requires that access to telecommunications and information services be available to consumers in rural and high-cost areas "in all regions of the Nation…." Similarly, advanced telecommunications services should be available "in all regions of the Nation." Thus, the goal is to make access to these services ubiquitous throughout the country.

But the task is not just on the federal government. Section 254(b) also expressed Congressional intent that states provide sufficient universal service support mechanisms. In addition, § 254(f) requires all telecommunications carriers providing intrastate service to contribute "in a manner determined by the State to the preservation and advancement of universal service *in that State.*" (Emphasis added.)[35]

Thus, Congress set up a dual structure for universal service: the FCC ensures that universal service principles are furthered on a national basis; and state regulators advance universal service in the state level. The two exist in tandem, however. Section 254(f) also requires that state mechanisms "do not rely on or burden Federal universal support mechanisms." Thus, states are expected to provide adequate funding for the advancement of universal service within their borders. It is therefore incumbent upon the FCC to ensure that state funding mechanisms are adequate, and the court directed the Commission to "develop mechanisms to induce state action to preserve and advance

[35] See also *Ninth Report and Order*, ¶ 38; *Qwest*, 258 F.3d at 1203.

universal service.[36] The Consumer Advocates will reserve comment on specific inducements for reply comments.

Yet the Commission should define "sufficient" to mean that, after the states are encouraged to establish their own universal service support mechanisms, the federal program will be such that rates in each state's rural areas will be no more than "reasonably comparable" to rates in urban areas. Such a definition would be consistent with the Congressional intent in §§ 254(b) and (f).

In addition, "sufficient" under the Act should take into account the financial resources that the ILEC has. Before an ILEC receives federal universal service money for high-cost support, the Commission should determine the ILEC's rate of return. An ILEC earning a healthy overall return, 11.25% for example, would receive reduced federal universal service money for high-cost support. This is consistent with the Commission's philosophy that support should be provided to those areas that need it most,[37] and would further the Act's directive that federal universal support mechanisms should not be unduly burdened.

In addition, this would help ensure that ILEC funds, and not federal support mechanisms, are being used to provide necessary support in high-cost areas. As fewer states look at ILECs' rates of return, the flow through of universal service fund money through consumer rates is less assured. ILECs that can afford to provide quality service in high-cost areas at just, reasonable and affordable rates should not receive universal service support.

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[36] See *Notice*, ¶ 22.

[37] See *Twentieth Order on Reconsideration*, CC Docket No. 96-45, FCC 00-126, adopted April 6, 2000, ¶ 4.

III. CONCLUSION.

The recommendations submitted by the Consumer Advocates are in line with the Tenth Circuit's opinion in *Qwest*. The Commission should adopt the Consumer Advocates' recommendations.

Respectfully submitted,

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